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No. 85-601

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PALMORE CURREY, II,
Petitioner,

v.

FREIDRICH WILHELM WAFFENSCHMIDT
and ANNA WAFFENSCHMIDT,
Respondents.

REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PRELIMINARY ANALYSIS

Under Rule 17, Rules of the Supreme Court of the United States, it is clear that review on certiorari is directed to the sound judicial discretion of this Court and is granted only where there are important and specials reasons therefor. Petitioner relys on subparagraph (c) in seeking a review of the Court of Appeals' decision on an important question of federal law which has not been, but which should be decided by this

Court, and which conflicts with an applicable decision of this Court in *Nishikawa* v. *Dulles*.[1]

As we read respondents' Brief in Opposition to Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit ("Respondents' brief"), it is directed solely to the merits of the case. On this petition, the issue is not whether the Fifth Circuit was right or wrong, but whether there are questions of sufficient importance to justify review. We reserve reply to the argument on the merits.

Respondents' brief does, however, contain significant matters which buttress our *Nishikawa* argument and sharpens the precise issue we believe to be of sufficient importance for review.

ARGUMENT

I

Application Of *Nishikawa*.

On the question of contempt, the crucial question is whether petitioner had actual notice of the provisions of the TRO *at the time it was negotiated to him by MacKay*. His testimony on this point was that he knew only that MacKay had sold his farm in Mississippi and moved to Texas, that he had no knowledge of the details of the transaction, that he knew nothing of the pendency of the underlying action, and that he did not know and had never heard of the Waffenschmidts. [Transcript, 79-80]

As pointed out in Respondents' brief [7, 17], respondent first received notice of the TRO and PI on

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[1] 356 U.S. 129 (1958).

July 12, 1983, the day of his deposition. Their charge of contempt is based solely on the fact that *after* he received notice, respondent cashed the T-note in controversy. *Had* Currey taken the T-note from MacKay with actual notice of the TRO, it would be a different matter. There is simply *no* evidence he did have such notice at this crucial point, and certainly not any "clear and convincing" evidence (whatever that means) he accepted the T-note with actual knowledge of the TRO.

Since the entire opinion of the Fifth Circuit is bottomed on the assumption respondent, "with actual notice of the [district] court's order, . . . actively aid[ed] and abet[ted] a party [MacKay] in violating that order" [Appendix 2a], it necessarily applied the rule of *Dyer* v. *MacDougall*,[2] and it also necessarily follows that both the District Court and the Court of Appeals adopted the opposite of respondent's testimony cited above.

Thus, *Nishikawa* has a direct bearing upon the issues in this case.

II

Whether The District Court Had *Power* To Adjudicate The Respective Rights Of Petitioner, Over Whom It Lacked Personal Jurisdiction, And Respondents Is An Important Question Which Should Be Settled By This Court.

It is undisputed that petitioner claimed the T-note was his property. He cashed it and used the proceeds in the renovation of the Holiday Inn. Rightly or wrongly, he claimed an independent interest in the instrument.

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[2] 201 F.2d 165 (2nd Cir. 1952).

If petitioner had acquired title to the T-note, then his refusal to surrender it could not be a violation of the TRO or PI, and could not constitute a contempt.

The District Court specifically found

> "Currey and Johnson are residents of Mount Pleasant, Texas. D & K Motor Sports, Inc., is a Texas corporation owned by Johnson. * * * None of the respondents has transacted business or owned assets within the State of Mississippi which would subject them to the in personam jurisdiction of this Court."

Appendix, 33a.

The consistent constitutional rule has been that a court has no power to adjudicate a personal claim or obligation unless it has jurisdiction over the person of the claimant. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969); cf.: *Heyman* v. *Kline*, 444 F.2d 65 (2nd Cir. 1971). Lacking personal jurisdiction over petitioner, the District Court could not adjudicate ownership of the T-note on July 12, 1983, and had no basis for contempt.

The Fifth Circuit's research has uncovered no cases which explicitly discuss whether a court may exercise jurisdiction over a non-party who knowingly aids and abets a violation of a court's orders but lacks other contacts with the forum. [Appendix, 8a]

Our research has produced cases only peripherally touching the point. In *Heyman, supra,* the district court had jurisdiction over the husband under a long-arm statute, but lacked jurisdiction over the wife. The Second Circuit held the district court could not issue an injunction requiring the wife to surrender an option in which she claimed a half interest. *Stiller* v.

Hardman, 324 F.2d 626 (2nd Cir. 1963), involved an attempt to register a judgment for damages and injunctive relief rendered by a Ohio district court against Squeeze-a-Purse Corporation in a patent infringement case, seeking to enjoin the corporation and its privies (the principal stockholder and chief supplier) from further infringement. The Second Circuit noted that the Ohio court had held it was without jurisdiction over the alleged privies (an unreported decision). [324 F.2d at 627] We speculate that the privies had transacted no business in Ohio which would subject them to the court's jurisdiction. *Stiller* permitted the money judgment to be registered, but refused to enforce the injunctive provisions.

In *Panther Pumps & Equipment Company, Inc.* v. *Hydrocraft, Inc.,* 566 F.2d 8 (7th Cir. 1977), suit for patent infringement was brought against Hydrocraft and two of its three officers. Beck, the third officer, was not a party. When it became apparent Hydrocraft was going to lose the suit, Beck bought out the other two, and shipped virtually all the assets from Illinois to Ohio where they wound up in his new, wholly owned corporation, Universal Spray Systems, Inc. ("Universal"). In the original action, the court awarded damages and enjoined Hydrocraft, "its divisions, subsidiaries, *officers,* agents, servants and assigns * * * directly or indirectly" from further infringement. [566 F.2d at 11. Emphasis is in reported case.] Panther Pumps moved for an order directed to Beck and Universal to show cause why they should not be held in contempt for violation of the injunctive provisions, and to add or substitute Beck and Universal as defendants. The district court issued a show cause order *only* to Beck. Although the Seventh Circuit held Uni-

versal was the alter ego of Beck (and presumably a "privy"), it further held,

> "The motion to substitute Universal faces an insurmountable obstacle: lack of personal jurisdiction."

566 F.2d at 23,

citing *Hazeltine, supra.* We think *Panther Pumps* stands for the proposition that a non-party may not be added as a defendant under Rule 25, FRCivP, or enjoined where, as appears from the facts of the case, it was an Ohio corporation not otherwise subject to the jurisdiction of the district court. We must agree that the opinion is cloudy and that the question is not as directly presented as it is here.

III

Rebuttal.

Respondents seem to suggest [Respondents' brief, p. 13, fn. 11] that the United States can exercise personal jurisdiction over any defendant within the United States, pointing out that they invoked jurisdiction in the district court under § 22(a) of the Securities Act of 1933 and § 27 of the Securities Exchange Act of 1934, each of which provides for nationwide service of process, even for pendent claims. The difficulty with that argument is that petitioner had no participation whatsoever in the fraud which is the basis of the underlying action, there is no claim of a securities violation against him, and there is nothing to which personal jurisdiction over him can "append".

The lower federal courts have only such jurisdiction as Congress chooses to bestow, within the limits of the Constitution. *Kline* v. *Burke Construction Co.,* 260

U.S. 226 (1922). No authority is needed for the proposition that, once a court acquires personal jurisdiction over a party, that jurisdiction may be exercised wherever that party may be. Congress has given nationwide jurisdiction in the areas of securities law, bankruptcy, etc., but not to enforce injunctions against non-parties. We equate "jurisdiction" with "power to act"; if a court lacks jurisdiction, it lacks power to enforce, be it an injunction, or any other order.

CONCLUSION

We have no difficulty with nationwide jurisdiction over a *party* who violates a court's order. We submit the question of a court's power to enforce its order against a *non-party* not otherwise subject to its jurisdiction, and the question of the basic unfairness of the *Dyer* v. *MacDougall* rule in the context of this case, are both "cert-worthy".

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that three true and correct copies of the foregoing instrument were forwarded via United States mail, postage prepaid, to James Schreiber, Esq., SCHWARTZ, KLINK & SCHREIBER, 666 Third Avenue, New York, NY 10017, counsel of record for respondents, and to Phillip N. Cockrell, Esq., HUBBARD, PATTON, PEEK, HALTOM & ROBERTS, 700 Texarkana National Bank Building, Texarkana, AR 75501, counsel for cross-respondent.

Dated this ____ November, 1985.

J. ROBERTSHAW